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In the

Supreme Court of the United States

October Term, 1963
No. 561

E. NEWBOLD SMITH,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

RESPONSE TO PETITION FOR CERTIORARI

OFFICE OF THE DISTRICT ATTORNEY
OF CHESTER COUNTY, PENNA.,
Court House Annex,
West Chester, Penna.

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RESPONSE TO PETITION FOR CERTIORARI

Respondent, at the request of the Attorney General of the Commonwealth of Pennsylvania, makes the following Response to the Petition of E. Newbold Smith.

COUNTER-STATEMENT OF THE CASE

The case which is the subject of this proceeding arose out of an arrest, indictment, trial and conviction of the petitioner, E. Newbold Smith, for the offense of assault and battery against a police officer in Thornbury Township, Chester County, Pennsylvania.

The offense, a misdemeanor under the laws of the Commonwealth of Pennsylvania, took place on August 8, 1960. Defendant was indicted by a Grand Jury on September 12, 1960, tried by a Jury which found defendant guilty on January 6, 1961.

Thereafter, defendant took steps in the County Court and the two appellate Courts of the Commonwealth of Pennsylvania, to have the conviction reversed but was unsuccessful; the last order being that of the Pennsylvania Supreme Court on August 7, 1963, denying petition for reargument filed by defendant and the American Civil Liberties Union.

OMISSION FROM PETITIONER'S STATEMENT OF THE CASE

On August 12, 1963, at about 7:30 p.m., petitioner, E. Newbold Smith, accompanied by his Attorney, John B. Hannum, Esq., voluntarily appeared at the Chester County Farms Prison and entered into compliance with the sentence of the trial Court which had imposed upon defendant a term of imprisonment of thirty days.

On August 13, 1963, defendant presented a Petition for Parole and the Court, by Judge Thomas A. Riley, fixed August 23, 1963 as the date for hearing on said petition.

On August 16, 1963 defendant petitioner was released on bail pending the filing by defendant's counsel, of a Petition for Certiorari in the Supreme Court of the United States.

COUNTER-STATEMENT OF QUESTION INVOL

Was petitioner denied due process of law becaus
trial Court refused his petition for a subpoena
tecum, directed to the Special Agent in Charge, Phil
phia Office of the Federal Bureau of Investigation
produce the records of an investigation into the fact
circumstances surrounding certain events of the nig
August 8, 1960"; said investigation having taken
after the incident for which petitioner stood trial and
investigation being the result of a complaint by petit
to the U. S. Attorney for the Eastern District of
sylvania alleging violation of his civil rights at the
Chester police station?

REASONS FOR NOT GRANTING THE WRIT

It should be noted preliminarily that the F. B. I. records petitioner sought, were statements allegedly taken from witnesses Sweet and Corcoran as a result of a complaint by petitioner to the U. S. Attorney for the Eastern District of Pennsylvania alleging violation of his civil rights at the West Chester police station. The federal indictment mentioned on page 4 of petition for certiorari and footnoted there as indictment No. 20686, concerns itself solely with events alleged to have taken place "in and about the premises of the police station in West Chester, Pa. . . ." The alleged events covered by the federal indictment transpired after the assault and battery charge on which petitioner was tried and convicted. The conviction of petitioner with which we are here concerned, involved the assault and battery on police officer Elliott at the cross-roads (intersection of Pennsylvania Routes Nos. 202 and 926); what followed at the police station had nothing to do with the instant case.

At trial, the victim, officer Elliott and defendant, Smith, accused each other of striking the first blow. It was the testimony of two women (Sweet and Corcoran), eye witnesses and completely disinterested, that supported the officer's testimony.

Each of the female witnesses had given the police a written statement of the cross-roads incident a few hours after it happened and these statements were given voluntarily to defense counsel by the District Attorney to aid them in the cross-examination of these witnesses.

There was a discrepancy between the testimony given by one of said witnesses at trial and in her written statement as to whether she actually saw who struck the first blow. Defense counsel cross-examined both of the witnesses thoroughly and vigorously on this inconsistency.

When the trial Judge inquired of defense counsel their reason for seeking the F. B. I. records, he was advised that the statements of one of the two eye witnesses (Sweet or Corcoran) allegedly obtained by the F. B. I. did not include "any observation of who struck the first blow." (pp. 97a, 98a).

Since the testimony offered from the witness stand and the written statements of the two witnesses furnished by the District Attorney pointed up the discrepancy and inconsistency which the defense was seeking to obtain from the statements taken from these witnesses by the F. B. I., it would necessitate considerable violence to logic to conclude that the petitioner was hurt by the denial. The record in the trial Court shows clearly that these witnesses were thoroughly and vigorously cross-examined on the very discrepancy and inconsistency for which the F. B. I. records were sought. Further the record shows on page 98a the following: "Mr. Hannum: If Mr. Rogers could use it, this would be in corroboration of her testimony or attack her credibility." Armed with the direct examination of these witnesses as given from the witness stand and their written statements as provided by the District Attorney, the requested result was obtained. The jury, however, resolved the issue against the respondent.

Petitioner relies on *Jencks v. United States*, 353 U.S. 657 (1956). It is respondent's position that *Jencks*, supra,

applies only to federal criminal prosecution and has no application to state criminal prosecutions. Further, as a result of the decision in *Jencks*, Congress enacted the "Jencks Law", 18 U.S.C.A. 3500, which provides inter alia, "(a) In any *criminal prosecution brought by the United States* . . ." (Emphasis added.)

See: *Com. v. E. Newbold Smith*, 412 Pa. 1, 4 (1963), citing *Palermo v. United States*, 360 U.S. 343, 345 (1959), footnote 2, noting that *Jencks* decision was based on the Court's power "to prescribe procedures for the administration of justice in the federal courts."

It is interesting to note that in *Jencks*, supra, the Government opposed petitioner's motion for production of statements of Ford and Matusow on the sole grounds that a preliminary foundation was not laid of inconsistency between the reports and testimony of the witnesses. The Government never asserted any privilege as to nondisclosure.

Petitioner's and the American Civil Liberties Union's complaint regarding the quashing of the original subpoena duces tecum and subsequent petition therefore, appears to be one of procedure rather than substance, i.e., that no sufficient reason existed for the refusal to issue the subpoena. It is claimed that the Attorney General did not instruct the assistant who appeared in Court to claim the federal privilege under the Department of Justice Order No. 3229.

Respondent, as well as petitioner, is unaware of what transpired in the office of the Attorney General after the subpoena was served. At trial, one James Kelley, an Assistant United States Attorney for the Eastern District

of Pennsylvania appeared before the Court and said, "This is an investigation by the United States Government and is confidential, and it is the position of the United States Government that the person served was the improper person to be served, and furthermore that this is a violation of the security of the office of the Department of Justice, and accordingly your Honor, I move that this subpoena be quashed" (page 24a).

Although there may not have been a verbatim compliance with the regulation, supra, for claiming a federal privilege, it is apparent that it was intended that the privilege against nondisclosure be claimed. It can only be assumed that in the subsequent denial of petition for subpoena, the trial Court had the previous claim of privilege in mind. The petitioner's position is apparently that the petition should have been allowed so that the privilege could again have been claimed by the Attorney General or a person acting on his behalf.

It seems clear that a state trial Court cannot force obedience of the subpoena if the refusal to comply is based on Department of Justice Order No. 3229. See: *People v. Parham*, 30 Cal. Rptr. 268, 273 (1963).

It is also clear that an employee of the Department of Justice refusing to produce records of his department upon the basis of Order No. 3229 cannot be held in contempt of court. See: *U. S. ex rel. Touhy v. Ragan*, 340 U.S. 462 (1951).

As respondent views the petition for certiorari it is based tentatively on *Jencks*, supra, and upon alleged improper compliance by the U. S. Attorney's Office for the Eastern District of Pennsylvania with Department of

Justice Order No. 3229; all of which amounts to a denial of due process.

Respondent concludes that *Jencks*, case supra, augmented by the "Jencks Act," supra, and *Palermo* case, supra, applies only to criminal prosecutions in the federal courts; that the Department of Justice can assert a privilege against nondisclosure pursuant to Order No. 3229; that such privilege was properly asserted in this case; that contempt will not lie against the person asserting the privilege in federal courts; and that state courts are under the same disability.

On the question of governmental privilege, attention is directed to the "Jencks Act", supra:

> "(a) If the United States elects not to comply with an order of the Court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the Court may direct, the Court shall strike from the record the testimony of the witness, and the trial shall proceed unless the Court in its discretion shall determine that the interest of justice require that a mistrial be declared."

The defense did not request the trial Court to strike the testimony of witnesses Sweet and Corcoran.

Regarding the underlying theme of denial of due process, even if we assume that *Jencks* applies to state prosecutions; that the privilege against nondisclosure was not properly asserted; that the trial Judge erred in quashing the original subpoena and in refusing the subsequent petitions for subpoena duces tecum, how was petitioner harmed by nonproduction of the F. B. I. reports? The

statements given by the two witnesses to police after the incident the subject of indictment and trial and supplied to defense counsel by the District Attorney, also did not include an observation as to who struck the first blow. (The avowed purpose for which the F.B.I. statements were requested.) As stated earlier in this response, the defense had before them at time of cross-examination the very inconsistency between the testimony as given from the witness stand and the written statements, that is now asserted as the violation of due process. The statements taken by the F. B. I. were made after the events which were the subject of the state prosecution; as a result of petitioner's charge of alleged civil rights violation and were never in the possession of the state prosecutor.

For a recent case passing on the issue here raised, see *People v. Parham*, 30 Cal. Rptr. 268, 273 (1963).

CONCLUSION

For the above reasons the Commonwealth of Pennsylvania respectfully urges that the Petition for Certiorari be denied.

Respectfully submitted,

OFFICE OF THE DISTRICT ATTORNEY
OF CHESTER COUNTY,
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West Chester, Pennsylvania.